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Kuyou Sports Goods Co., Ltd

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KUYOU SPORTS GOODS CO. Ltd, Plaintiff, v. FOUNTAIN, INC., a California Corporation, Defendants.	Case No.: **COMPLAINT FOR** **(1) DECLARATORY JUDGMENT OF PATENT NON-INFRINGEMENT;** **(2) TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS;** **(3) INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE** **DEMAND FOR JURY TRIAL**

Plaintiff Kuyou Sports Goods Co., Ltd. ("Kuyou"), through counsel, hereby brings its Complaint for (1) declaratory judgment of patent non-infringement; (2) tortious interference with contractual relations; and (3) interference with prospective economic advantage against the entity known as Fountain, Inc., ("Fountain"), and alleges as follows:

INTRODUCTION

1. This action seeks (1) a declaration of non-infringement of United States Patent No. 9,077,877; (2) a finding that Fountain tortiously interfered with the contractual relationships between Kuyou and its online retailer, and (3) a finding that Fountain interfered with Kuyou's prospective economic advantage.

PARTIES

2. Plaintiffs Kuyou is a Chinese company having its principal place of business at No.168, Xiangrong Road, Songmushan Village, Dalang County, Dongguan, Guangdong, China 523795.

3. According to the U.S.P.T.O assignment records, Defendant FOUNTAIN, INC. is located at 6145 SHOUP AVENUE, UNIT #58, WOODLAND HILLS, CALIFORNIA, but Plaintiff is without sufficient information to confirm the accuracy of this information.

JURISDICTION AND VENUE

4. This Complaint arises under the Patent Laws of the United States, 35 U.S.C. § 100 et seq., the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

5. This Court has original jurisdiction over the subject matter of these claims pursuant to 28 U.S.C. §§ 1331, 1338(a) and 2201(a).

6. This Court has personal jurisdiction over Fountain because it is a resident of this state and this district.

7. Venue is proper in this District under 28 U.S.C. §§ 1391 (b), (c), and 1400 (b), because a substantial part of the events giving rise to Kuyou's claim occurred in this district, and because Fountain is subject to personal jurisdiction here.

8. An immediate, real, and justiciable controversy exists between Kuyou and Fountain as to whether Kuyou is infringing or has infringed United States Patent No. 9,077,877 (“the ‘877 patent”).

PATENT IN SUIT

9. On its face the ‘877 patent is entitled “Active headwear for detachably mounting an imaging device.” The ‘877 patent lists the following information, the truth or accuracy of which Plaintiff is unable to confirm:

Inventors: Fountain; Thomas Lee (Woodland Hills, CA)

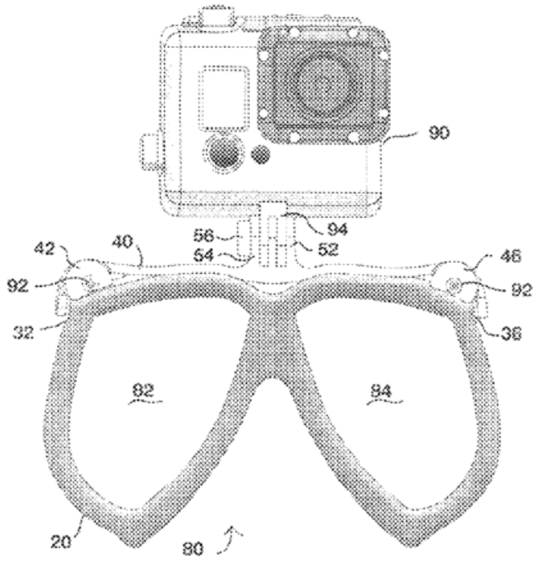
Assignee: Fountain, Inc. (Woodland Hills, CA)

Appl. No.: 13/987,215

Filed: July 10, 2013

Issued: July 7, 2015

10. The ‘877 patent is directed to a mounting system and method for securing a camera to a two-lens diving mask. In one embodiment, the mounting system includes a frame to which can be attached a head strap to form a diving mask. A digital camera or a video recorder is then secured to an attachment base in the mounting system to allow use thereof in a hands-free operating mode. Below is Figure 1 from the ‘877 patent:



11. A copy of the ‘877 patent is attached as Exhibit A.

12. According to the records at the United States Patent and Trademark Office, Fountain, Inc., is the assignee of the '877 patent.

KUYOU'S FULL-FACE SNORKELING MASK

13. Kuyou manufactures and sells numerous products for sports, recreation, and other activities. Relevant here is Kuyou's full-face snorkeling mask w/ camera mount, photographs of which are below. As can be seen, Kuyou's mask is designed to cover the full- face of the user, which allows the user to more comfortably breath during snorkeling activities without having to continuously clench a snorkel mouthpiece in the mouth. Kuyou's design also includes a full-face bulbous undivided viewing glass that allows a fuller field-of-view than possible with prior art products. The mask includes an integrated mount at the top edge for connecting a Go-Pro or other waterproof-type camera. Kuyou manufactures these masks, which it sells to various online retailers, who then resell the masks to the retail customers.

DEFENDANT FOUNTAIN'S SHAM ENFORCEMENT CAMPAIGN

14. Defendant Fountain is a non-practicing entity that has been heavily engaged in sham assertions of the '877 patent against multiple companies. According to written correspondence from Fountain's counsel, Fountain has "sued over 200 parties for infringing [the '877] patent, and our enforcement efforts are ongoing. Therefore, if you do not enter into a licensing arrangement with Fountain, Inc., we will expect you to cease sales of your infringing products and will file suit if you do not." Copies of exemplary correspondence from Fountain's counsel are attached as Ex. B and incorporated herein by reference.

15. Fountain's business model has been to contact online marketplaces such as Amazon.com that carry masks with camera mounts and – based on unfounded and untrue accusations that the accused masks infringe the '877 patent – utilize "take-down" procedures to force the online marketplace to cease sales of the accused masks. Copies of exemplary correspondence from Amazon is attached as Ex. C and incorporated herein by reference.

16. After Fountain interrupts the lawful efforts of Kuyou's online retailer to the accused full-face snorkel masks, Fountain's counsel then contacts the online retailer to demand an exorbitant "license" fee as a condition for Fountain ceasing its interfering conduct. Fountain has demanded a fee of $11 for each mask sold. Ex. D. Fountain makes this demand despite that such masks frequently sell for $30 (including the costs of shipping), i.e., an eye-popping royalty of nearly 50%. Ex. E.

17. As the attached correspondence illustrates, Fountain's meritless accusations of patent infringement have focused in particular on Plaintiff Kuyou's full-face snorkel masks.

18. Fountain has focused its attack on small online retailers of the Kuyou mask. On information and belief, Fountain has taken this tact because these small retailers have insufficient funds to mount a defense to Fountain's meritless claims and can be more easily bullied into paying Fountain's exorbitant demands.

19. And bullying is exactly what Fountain has done here. As one example, after Fountain unfairly extracted a $2,000 payment from one of Kuyou's online retailers using false allegations of patent infringement, Fountain continued to hound the retailer for an additional exorbitant royalty of $11 per mask for all further mask sales. Ex. H. And when the retailer was reluctant to provide its "pound of flesh," Fountain resorted bullying the retailer with utterly false threats, including that the retailer's products would be removed from Amazon "with no chance to re-list them." Portions of Fountain's aggressive and false posturing are reproduced below:

> My client has also not yet received a sales report or royalty payment for September's sales.
>
> You have 24 hours to send these items. If they are not received in that time, we will declare you in breach of the license agreement, and your Amazon listings will then be terminated in accordance with Section 14.15 of the license agreement with no chance to re-list them. Given the severity of this measure, we hope you will continue to pay my client the royalties it is owed. Once we terminate your listings, there will be no chance to fix this.

Id.

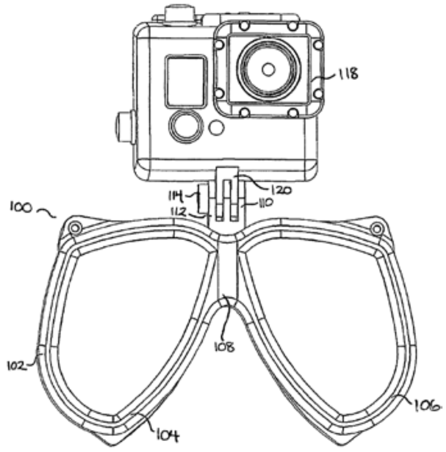
20. As a result of Fountain's wrongful conduct and relentless and false accusations of patent infringement against Kuyou and its products, Fountain has caused significant harm and lost sales to Kuyou as well as resellers of Kuyou's products. Fountain's enforcement campaign has indeed placed a cloud on Kuyou's lawful sales of its dive mask products; threatened Kuyou's business and relationships with its customers and partners; harmed Kuyou's sales of its dive mask products; and created a justiciable controversy between Kuyou and Fountain.

21. For all these reasons, an actual controversy exists between Kuyou and Fountain regarding the alleged infringement of any claim of the '877 patent.

KUYOU DOES NOT INFRINGE THE '877 PATENT

22. Kuyou's products do not infringe any claim of the '877 patent. As the attached correspondence shows, Fountain has alleged that Kuyou's full-face snorkel mask infringes claims 6-8 of the '877 patent. Ex. F, Letter from counsel for Fountain ("We have prepared and attached a preliminary claims chart showing our assessment of how your client's full-face mask with GoPro mount product infringed claims 6 through 8 of the patent.")

23. Fountain's infringement allegations are false, which can be readily demonstrated through even a cursory comparison of these claims against Kuyou's product. In particular, as shown in the table below, the Kuyou masks do not meet the critical limitations of the '877 patent claims, which are all directed to a traditional style masks having a right lens and a left lens connected together by a nosepiece.

Claim Limitation	Representative '877 patent disclosure	Kuyou Full-Face Mask
6. A mounting assembly, suitable for securing an imaging device to a head of a user, said mounting assembly comprising: an integrated headwear frame and attachment base …. ; wherein said integrated headwear frame and attachment base further has a right lens frame and a left lens frame, wherein the right lens frame is attached to the left lens frame by nosepiece …..	 Fig. 10 "Another embodiment of the invention, where the headwear frame and attachment base are integrated (i.e., not separable), with an imaging device attached to the attachment base, is shown in FIG. 10 (front view). ***Mounting assembly 100 includes frame 102 and a right lens frame 104 attached to a left lens frame 106 by a nosepiece 108.*** Two or more engagement tabs 110 and adjacent retainer engagement tab 112, including a boss 114 configured to hold a fastening device, may be provided at the top of the nosepiece 108."	Fountain's claimed invention is directed specifically to a two-pane dive mask having both "a right lens frame [104] and a left lens frame [106]." And the claims explicitly describe that "the right lens frame is attached to the left lens frame by nosepiece [108]." But as plainly shown above, Kuyou's full-face mask is not a traditional two-pane dive mask. Rather, it is a full-face mask having only one bulbous transparent front shield with a single surrounding frame. The Kuyou mask thus lacks multiple critical limitations recited in the '877 patent claims: it does not have a right lens frame; it does not have a left lens frame; and it does not have a connecting nosepiece therebetween.

24. Claim 6 of the '877 patent thus requires "a right lens frame and a left lens frame, wherein the right lens frame is attached to the left lens frame by nosepiece." The Kuyou full-face snorkel mask, however, lacks each of these required elements. The Kuyou mask therefore cannot infringe claim 6 of the '877 patent, or claims 7 and 8, which depend from claim 6.

25. As noted above, Fountain has never contended that Kuyou's products infringe Claims 1 through 5 of the '877 patent. Ex. F. Nor could it make such an accusation. Claim 1 of the '877 patent recites:

1. A mounting assembly, suitable for securing an imaging device to a head of a user, said mounting assembly comprising:

a headwear frame configured for placement over a face of the user, said headwear frame having a first mounting rim disposed at a first side of said headwear frame and a second mounting rim disposed at a second side of said headwear frame;

and an attachment base, said attachment base including at least two engagement tabs configured to mate with a camera mount, said attachment base further including a first clamp configured to mate with said first mounting rim and a second clamp configured to mate with said second mounting rim,

wherein said first clamp comprises a through hole to align with a through hole in said first mounting rim and said second clamp comprises a through hole configured to align with a through hole in said second mounting.

Ex. A.

26. As can be seen, claim 1 requires "first and second clamps." Claim 2, which depends from claim 1, likewise requires these "first and second clamps." The same is true of claims 3 and 4, which both include similar language regarding "first and second clamps." *Id.* But Kuyou's product does not include such "first and second clamps" and Fountain does not and cannot contend otherwise.

27. Fountain has been repeatedly notified of the deficiencies in its infringement allegations. Ex. G. For example, Kuyou has explicitly pointed out that its mask lacks the required elements set forth in Claim 6, including "a right lens frame and a left lens frame, wherein the right lens frame is attached to the left lens frame by nosepiece." *Id.* But

Fountain has simply brushed over this critical deficiency, making the claim that – while missing numerous elements of the '877 patent claims – the Kuyou mask nonetheless infringes under the "Doctrine of Equivalents." Ex. F. As explained below, Fountain's reliance on the "Doctrine of Equivalents" borders on absurd.

28. The doctrine of equivalents is curbed by two important and related legal doctrines.

29. First, the doctrine of claim vitiation prevents application of the doctrine of equivalents in a way that would completely eliminate a claim element – i.e., renders the claim limitation inconsequential or ineffective. This doctrine has its roots in the all elements rule: "[e]ach element contained in a patent claim is deemed material to defining the scope of the patented invention, . . . the doctrine of equivalents must be applied to individual elements of the claim, not to the invention as a whole." Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 29 (U.S. 1997). As stated in Warner- Jenkinson, "if a theory of equivalence would entirely vitiate a particular claim element, partial or complete judgment should be rendered by the court, as there would be no further material issue for the jury." *Id.* at 39, fn.8.

30. Second, the doctrine of prosecution history estoppel limits the broad application of the doctrine of equivalents by barring an equivalents argument for subject matter relinquished when a patent claim is narrowed during prosecution. *Conoco, Inc. v. Energy & Envtl. Int'l, L.C.*, 460 F.3d 1349, 1363 (Fed. Cir. 2006) (citations omitted). The Federal Circuit has recognized that prosecution history estoppel can occur during prosecution in one of two ways: (1) by making a narrowing amendment to the claim ("amendment-based estoppel") or (2) by surrendering claim scope through argument to the patent examiner ("argument-based estoppel"). *Id.*

31. Both claim vitiation and prosecution history estoppel apply here to preclude Fountain's attempted reliance on the doctrine of equivalents.

32. Regarding the doctrine of claim vitiation, the Kuyou mask does not include a right frame, it does not include a left frame, and it does not include nosepiece connecting

the two. This is not a situation where the missing claim elements required by the '877 patent claims can somehow be equated to other equivalent elements in the Kuyou mask. To the contrary, applying the doctrine of equivalents in the manner proposed by Fountain would remove these limitations entirely. There can be no equivalence in this situation.

33. Regarding the doctrine of prosecution history estoppel, at least amendment-based estoppel precludes the doctrine of equivalents here. As originally presented, Defendant Fountain sought to patent exactly what it now seeks to claim through the doctrine of equivalents, a mounting assembly comprising a frame placed over the face of the user, which includes two engagement tabs for connecting a camera. This can be seen in Fountain's originally filed claims 10, 11, 12, and 13 from its initial patent application, which are reproduced below:

10. A mounting assembly, suitable for securing an imaging device to the head of a user, said mounting assembly comprising:

an integrated headwear frame and attachment base, wherein said headwear frame is configured for placement over the face of a user, and wherein said attachment base includes at least two engagement tabs, and wherein the engagement tabs are configured to mate with a camera mount.

11. The mounting assembly of claim 10, wherein said integrated headwear frame and attachment base further has a right lens frame and a left lens frame, wherein the right lens frame is attached to the left lens frame by a nosepiece.

12. The mounting assembly of claim 11, wherein said attachment base further has a retainer engagement adjacent to the at least two engagement tabs.

13. The mounting assembly of claim 12, wherein the engagement tabs and the retainer engagement tab are spaced apart so as to define open transverse slots suitable for the insertion of a camera mount.

34. The examiner, however, issued an office action rejecting claim 10 over the prior art, noting that U.S. Pat. Publication No. 20080192114 to Peason et al. included each and every one of the elements set forth in originally filed Claim 1 as well as originally filed Claim 10:

Claims 1-2, 4-5 are rejected under 35 U.S.C. 102(a)(1) as being anticipated by U.S. Patent Publication No. 2008/0192114 to Pearson et al. (Pearson).

Regarding claim 1, 10, Pearson '114 discloses a mounting assembly (Fig. 14) suitable for securing an imaging device to the head of a user, the mounting assembly comprising: a headwear frame as shown in Fig. 14, configured for placement over a face of the user, the headwear frame having a first mounting rim (1402) disposed at a first side of the frame and a second mounting rim (opposite side) disposed at a second attachment base further including a first clamp (left) configured to mate with the first mounting rim and a second clamp (right) configured to mate with the second mounting rim.

35. The examiner, however, noted that originally-filed claim 13, would be allowable if rewritten to also include each limitation found in the preceding claims, i.e., each and every limitation found in claims 10, 11, 12, and 13. This includes the limitations in question here: "a right lens frame and a left lens frame, wherein the right lens frame is attached to the left lens frame by nosepiece."

36. Importantly, Fountain did not dispute the examiner's characterization of the Pearson reference as disclosing each and every element of original claim 10. To the contrary, it "gratefully" acknowledged the examiner's finding of allowable subject matter and presented an entirely new claim, original claim 13, which was renumbered as claim 6 when the '877 patent was issued:

13. (Currently amended) A mounting assembly, suitable for securing an imaging device to a head of a user, said mounting assembly comprising:

an integrated headwear frame and attachment base, wherein said headwear frame is configured for placement over a face of a user, and wherein said attachment base includes at least two engagement tabs, and wherein the engagement tabs are configured to mate with a camera mount;

wherein said integrated headwear frame and attachment base further has a right lens frame and a left lens frame, wherein the right lens frame is attached to the left lens frame by a nosepiece;

wherein said attachment base further has a retainer engagement adjacent to the at least two engagement tabs;

~~The mounting assembly of claim 12,~~ wherein the engagement tabs and the retainer engagement tab are spaced apart so as to define open transverse slots suitable for the insertion of a camera mount.

37. As shown above, Fountain amended his claims to overcome the prior art, adding the very same limitations Fountain now seeks to ignore through the doctrine of equivalents.

38. Fountain's conduct during prosecution epitomizes prosecution history estoppel. *Honeywell Int'l Inc. v. Hamilton Sundstrand Corp.*, 370 F.3d 1131 (Fed. Cir. 2004) (*en banc*) (rewriting of dependent claims into independent form coupled with the cancellation of the original independent claims creates a presumption of PHE.)

39. Fountain thus cannot credibly assert infringement of the '877 patent, whether literally or under the doctrine of equivalents.

FIRST COUNT

(Declaration of Non-Infringement of the '877 Patent)

40. Kuyou restates and incorporates by reference the allegations in the preceding paragraphs of this Complaint as if fully set forth herein.

41. Fountain claims to own all rights, title, and interest in the '877 patent, a copy of which is attached hereto as Exhibit A.

42. As demonstrated above and in the attached exhibits (Exs. B, C, D, and E), Fountain has repeatedly and relentlessly accused Kuyou and its products of infringing the '877 patent, in that Kuyou "makes, uses, sells, offers for sale, imports, exports, supplies and/or distributes within the United States" its full face snorkel mask.

43. A substantial, immediate, and real controversy therefore exists between Kuyou and Fountain regarding whether any Kuyou product infringe or have infringed the '877 patent. A judicial declaration is necessary to determine the parties' respective rights regarding the '877 patent.

44. Kuyou seeks a judgment declaring that its products do not directly or indirectly infringe any claim of the '877 patent.

SECOND COUNT

(Tortious Interference with Contractual Relations)

45. A knowing and intentional false accusation of patent infringement or the willful disregard for such a false accusation is a basis for a claim for tortious interference with contractual relations. Intentional interference with contractual relations arises where there exists:

1) a valid contract between plaintiff and a third party;

2) defendant's knowledge of the contract;

3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship;

4) actual breach or disruption of the relationship; and

5) resulting damage.

Quelimane Co. v. Stewart Title Guar. Co., 19 Cal.4th 26, 55, 77 Cal.Rptr.2d 709, 960 P.2d 513 (Cal. 1998).

46. In this instance, valid contracts exist between Kuyou and the online retailers of Kuyou's accused full-face snorkeling masks. Fountain is fully aware of these contracts, but as explained above has nonetheless deliberately sought to disrupt Kuyou's contractual relationship with these retailers.

47. By Fountain's conduct, Fountain has actually disrupted Kuyou's relationship with its online retailers, including online retailers being unable to sell Kuyou's accused full-face snorkel mask. Fountain's false allegations of patent infringement and complaints have resulted in the removal of Kuyou's products from Amazon and elsewhere. Kuyou has therefore suffered damages a result of Fountain's conduct, including lost sales of its accused full-face snorkel masks.

THIRD COUNT

(Interference with Prospective Economic Advantage)

48. Even further, Fountain is liable to Kuyou for its interference with prospective economic advantage. Interference with prospective economic advantage requires:

1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff;

2) the defendant's knowledge of the relationship;

3) intentional acts on the part of the defendant designed to disrupt the relationship;

4) actual disruption of the relationship; and

5) economic harm to the plaintiff proximately caused by the acts of the defendant. Korea

Supply v. Lockheed Martin Corp., 29 Cal.4th at 1153, 131 Cal.Rptr.2d 29, 63 P.3d 937 (Cal. 2003).

49. Interference with prospective economic advantage also requires a plaintiff to allege an act that is wrongful independent of the interference itself. *Della Penna v. Toyota Motor Sales, U.S.A., Inc*., 11 Cal.4th at 392-93, 45 Cal.Rptr.2d 436, 902 P.2d 740 (Cal. 1995). An act is independently wrongful if "if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Id.*

50. Here, an economic relationship existed between Kuyou and its online retailers, with the probability of future economic benefit to Kuyou.

51. Fountain is fully aware of these relationships between Kuyou and its online retailers, but as explained above has nonetheless deliberately sought to disrupt Kuyou's relationship with these retailers.

52. By Fountain's conduct, Fountain has actually disrupted Kuyou's relationship with its online retailers, including online retailers being unable to sell Kuyou's accused full-face snorkel mask. Fountain's false allegations of patent infringement and complaints have resulted in the removal of Kuyou's products from Amazon and elsewhere. Kuyou has therefore suffered damages a result of Fountain's conduct, including lost sales of its accused full-face snorkel masks.

53. Also, Fountain's conduct includes an independently wrongful act consisting of knowingly false and unsupported accusations of patent infringement towards Kuyou and its products.

PRAYER FOR RELIEF

WHEREFORE, Kuyou prays for judgment and relief as follows:

A. Declaring that Kuyou's products do not infringe any claim of the '877 patent;

B. Declaring that judgment be entered in favor of Kuyou and against Fountain on each of Kuyou's claims;

C. Awarding Kuyou the full measure of damages arising from or related to Fountain's tortious interference with Kuyou's contractual relations and interference with Kuyou's prospective economic advantage;

D. Awarding Kuyou punitive damages for Fountain's tortious conduct;

E. Preliminarily and finally enjoining Fountain from further interference with Kuyou's contractual relations and interference with Kuyou's prospective economic advantage, including preliminarily and finally enjoining Fountain from making any further allegations of patent infringement regarding Kuyou's products;

F. Finding that this an exceptional case under 35 U.S.C. § 285;

G. Awarding Kuyou its costs and attorneys' fees in connection with this action; and

H. Such further and additional relief as the Court deems just and proper.

Dated: March 10, 2017

ONE LLP

By: */s/* Nathaniel L. Dilger

Nathaniel L. Dilger
Attorney for Plaintiff,
Kuyou Sports Goods Co., Ltd

JURY DEMAND

Plaintiff Kuyou hereby demands a jury trial on all issues and claims so triable.

Dated: March 10, 2017

ONE LLP

By: */s/* Nathaniel L. Dilger

Nathaniel L. Dilger
Attorney for Plaintiff,
Kuyou Sports Goods Co., Ltd